FILE COPY

Office Supreme Court, U. S.
FILED
OCT 18 1948
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

William H. Dolonius ..... Cross-Petitioner

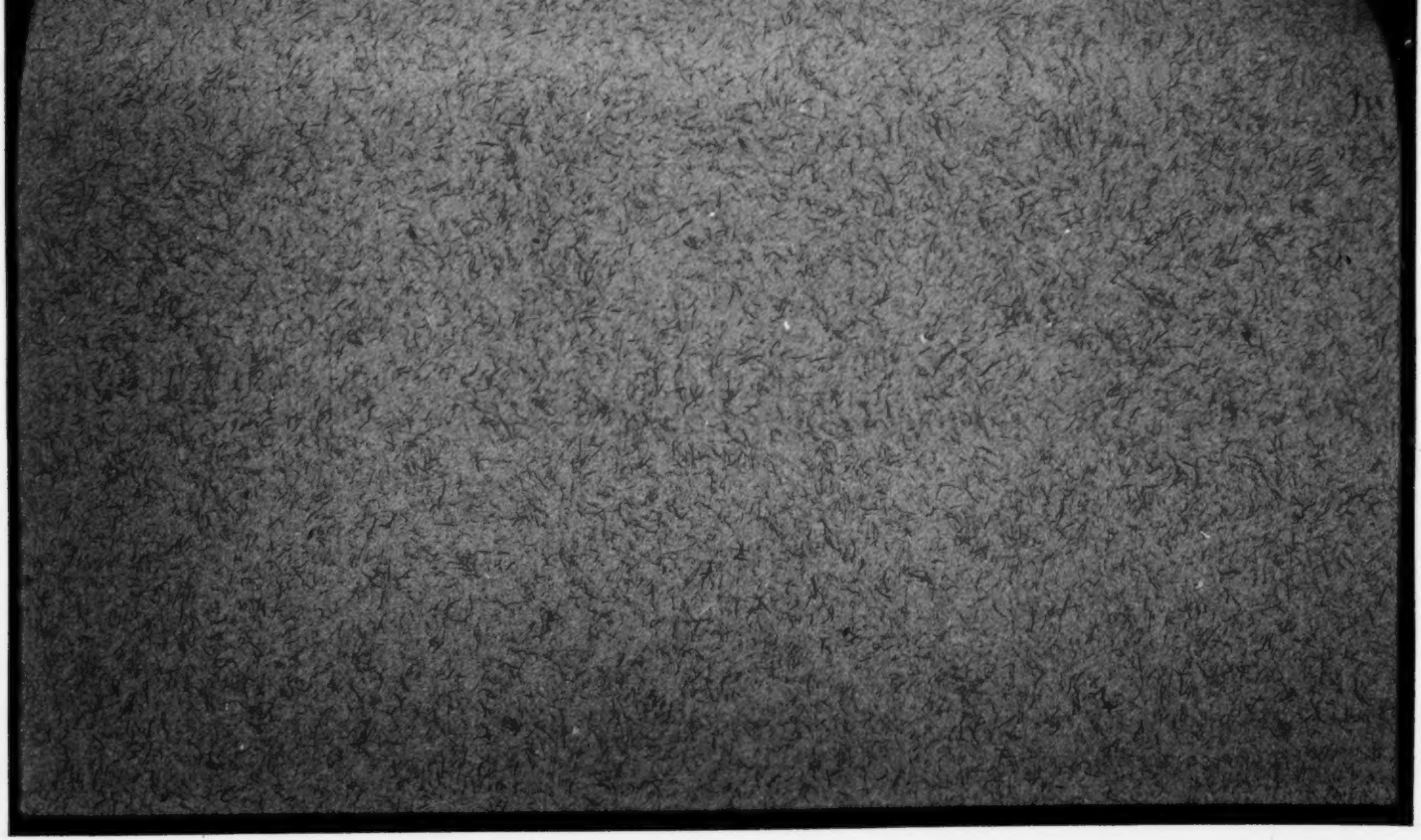
v. No. 359

Guy A. Thompson, Trustee for Missouri Pacific Railway Company, and System Federation No. 2 of Railway Employees Department of American Federation of Labor, and J. J. Byrne, President of said System Federation ..... Respondents

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Leon B. Catlett
737 Pyramid Building
Little Rock, Arkansas

Attorney for Cross-Petitioner, William H. Dolonius



INDEX

TABLE OF CASES

(Index Cont.)

TABLE OF STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

WILLIAM H. DELOZIER ..... *Cross-Petitioner*

v. No. 148

GUY A. THOMPSON, TRUSTEE FOR MISSOURI-PACIFIC RAILWAY COMPANY, AND SYSTEM FEDERATION NO. 2 OF RAILWAY EMPLOYEES DEPARTMENT OF AMERICAN FEDERATION OF LABOR, AND J. J. BYRNE, PRESIDENT OF SAID SYSTEM FEDERATION ..... *Respondents*

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Cross-Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, entered April 19, 1948, affirming the judgment of the District Court of the United States for the Eastern District of Arkansas, which dismissed the Petition of Cross-Petitioner.

OPINIONS BELOW

The opinion of the United States Circuit Court of Appeals for the Eighth Circuit (R.95) was handed down on

April 19, 1948, and is reported in 167 F. (2d) 626. Rehearing was denied by the Circuit Court of Appeals on June 1, 1948 (R.119). The opinion of the United States District Court for the Eastern District of Arkansas (R. 70) has not been reported.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Eighth Circuit sought to be reviewed was entered on April 19, 1948 (R.105). The jurisdiction of this Court is invoked under Section 240(a) of the *Judicial Code as amended by Act of February* 13, 1925 (28 U.S.C.A. 347). On August 27, 1948, an order was entered in this Court extending the time within which to file this Cross-Petition to and including October 31, 1948.

QUESTION PRESENTED

Do the provisions of Section 8 of the Selective Training and Service Act of 1940, as amended, entitle a veteran-employee to improvement in his status which would have resulted if he had continued on the job instead of entering the armed forces?

GROUNDS FOR APPLYING FOR WRIT

1. This case involves important questions of Federal law which have not been, but should be, settled by this Court, among which is the interpretation to be accorded to the Selective Training and Service Act of 1940, as amended, as it affects the employment rights of war veterans and their fellow employees in almost all of the industries in the United States, and a determina-

tion of these questions is of vital and immediate importance to employers, employees and their representatives.

2. The United States Circuit Court of Appeals for the Eighth Circuit has rendered a decision in conflict with the decisions of this Court and of other Circuit Courts of Appeals on the questions here involved.

3. The decision of the United States Circuit Court of Appeals for the Eighth Circuit is in conflict with the decision of this Court in the case of *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230, in holding that a veteran-employee was not entitled to be restored to the position which he left, plus cumulative seniority.

4. The rights of this Cross-Petitioner, his fellow employees and those similarly situated throughout the country, are seriously damaged by the decision of the United States Circuit Court of Appeals for the Eighth Circuit.

STATUTES INVOLVED

The pertinent portions of the Selective Training and Service Act of 1940, as amended, (54 Stat. 885, 50 U.S.C. App. Ses. 301, *et seq.* amended 56 Stat. 724, 58 Stat. 798), are as follows:

> "Sec. 8 (a). Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which

shall include a record of any special proficiency or merit attained. • • •

"(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for re-employment within ninety days after he is relieved from such training and service—

> "(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority status, and pay, unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; • • •

"(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of sub-section (b) shall be considered as having been on furlough or leave of absence during his period of active military service, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was ordered into such service, and shall not be discharged from such position without cause within one year after such restoration."

STATEMENT OF CASE

Cross-Petitioner, prior to his induction into the armed forces on October 5, 1942, had been employed by Respondent, Guy A. Thompson, Trustee for Missouri-Pacific Railway Company, for eight and one-half years as a carman helper. The System Federation No. 2, of the Railway Employees Department of the American Federation of Labor, at all times pertinent to this case, was the representative for the purpose of collective bargaining under the provisions of the Railway Labor Act (45 U.S.C.A. 151).

The crisis brought about by the War created a greater demand for skilled mechanics than could be met. In recognition of this fact the System Federatiton and the Railway Company, on July 1, 1942, amended their agreement which had been in force since July 1, 1936, so as to provide conditions under which carman helpers might be advanced to the higher classification of carman-mechanics, to fill the need for workmen in that classification when there were none available. There were seven material provisions in this amended agreement as far as this case is concerned, which are summarized as follows: (1) helpers not qualified under the then existing rule for permanent assignment as mechanics could be temporarily advanced to service as mechanics, and (2) men so advanced would be paid the regular mechanic's rate of pay for whatever mechanic's service they might be assigned to perform, and (3) men so advanced would not acquire seniority as mechanics, but would retain and accumulate seniority in the helper classification from which they had been advanced, and (4) when qualified mechanics were available, such mechanics would be employed in preference to those men temporarily advanced to service as mechanics, (5) in

which event, and in the event of a reduction in force, helpers temporarily advanced or mechanics would be returned to their permanent helper's positions in the order of their seniority as helpers, and (6) would be reduced before qualified mechanics were laid off, but (7) they were eligible for permanent assignments as mechanics, as follows:

> "Regular helpers advanced, who, during the continuation of this agreement, accumulate three years or more service as mechanics, may thereafter continue in the mechanic's classification, seniority as such dating from the termination of the three-year period of service as a mechanic, or they may then revert to their former position of regular helper, ... ".

Cross-Petitioner, Delozier, it is stipulated, was qualified for advancement to the position of carman-mechanic, and would have been advanced to that position except for the fact that he entered military service on October 5, 1942. He was honorably discharged from the armed forces on October 25, 1945, and re-employed as a helper on December 31, 1945, but raised on January 10, 1946, to carman mechanic. On March 30, 1946, less than a year after his re-employment, he was demoted to his old position as a helper, thereby losing 20 cents per hour in pay and other advantages. It is also stipulated that the demotion was caused solely by reductions in personnel, and not by any lack of ability to perform the work.

Employees who did not go to war and who served the three years required by the amended agreement to attain the permanent classification of carman-mechanic were awarded such permanent classification at the end of such service period. The result of the permanent classification was that these employees held their positions as car-

men-mechanics and were not demoted when Cross-Petitioner was returned to his classification as helper. If Cross-Petitioner had received credit for his military service as time on the job, or if he had avoided military service and remained on the job, he would have been senior to these other employees, who would have suffered demotiton, if there was any.

Cross-Petitioner, in accordance with the provisions of the Selective Training and Service Act of 1940 as amended, invoked the assistance of the United States Attorney and filed his petition in the United States District Court, alleging that the railway company had denied him his employment seniority rights and discharged him without cause within one year after his re-employment on return from service. He prayed for the awarding to him of a position as carman-mechanic, requesting that his military service be included as employment time, and for damages on account of lost wages. The Respondent Railway Company answered, denying that Cross-Petitioner was wrongfully demoted, and setting up the contract with the Respondent, System Federation No. 2. The Union and its President were permitted to intervene as defendants. The defense was largely conducted by the Union, seeking to uphold the seniority alleged to have been acquired by the stay-at-home workmen at the expense of the service men during their absence in military service. Trial resulted in judgment for the defendants, which judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit as to this Petitioner.

SPECIFICATION OF ERRORS TO BE URGED

The United States Circuit Court of Appeals for the Eighth Circuit erred:

1. In holding that Cross-Petitioner was not entitled to gain by his service for his country an advantage which it was stipulated would have been accorded him had he remained behind.

2. In holding that Cross-Petitioner should not receive credit for his military service as time on the job.

3. In affirming the judgment of the District Court below.

REASON FOR GRANTING THE WRIT

This case involves a problem of far-reaching importance with respect to the interpretation of the provisions of the Selective Training and Service Act. Many Federal courts have differed in the determination of these same questions, thus inviting litigation in each new case that arises. This Court has not previously passed upon the question presented in this Cross-Petition, and its decision is essential to the establishment of principles which will eliminate in a large measure new litigation, and achieve uniformity in the treatment accorded to returning service men with respect to their re-employment rights. The basic problem involved in this case is whether an ex-service man should be accorded the employment rights and status which he would have achieved by remaining actively at work in private employment, or whether he should be penalized for service to his country.

I

Cross-Petitioner Should Have Been Classified as a Carman-Mechanic at the Time of his Re-employment

Section 8 of the Selective Training and Service Act of 1940, as amended (54 Stat. 885, 50 U.S.C. App. 301), guarantees (1) that a veteran-employee shall have a stated period of time in which to apply for re-employment; (2) that he shall be restored to his former position "or to a position of like seniority, status and pay"; (3) that he shall be "restored without loss of seniority"; and (4) that he "shall not be discharged from such position without cause within one year after such restoration."

This Court, in the case of *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U.S. 275, 66 S. Ct. 1105, 90 L. Ed. 1230, very definitely said:

> "The Act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. He was, moreover, to gain by his service for his country, advantage which the law withheld from those who stayed behind."

The Circuit Court of Appeals for the First Circuit, in the case of *McCarthy* v. *M & M Transportation Co.* (C.C.A. 1), 160 F. (2d) 322, followed the admonition in the Fishgold case, saying:

> "In passing the Selective Training and Service Act, Congress sought, among other things, to protect the veteran from being penalized on his re-

> turn by reason of his absence from his civilian job, and the Supreme Court has stated the Act must be liberally construed to carry out its purposes."

The same rule of construction was stated in *Kay* v. *General Cable Corporation* (C.C.A.3), 144 F. (2d) 653, as follows:

> "Every consideration of fairness and justice makes it imperative that the Statute should be construed as liberally as possible, so that military service should entail no greater set-back in the private pursuit or career of the returning soldier than is unavoidable."

The rule is so well settled that citation of further authorities would unnecessarily burden the Court and needlessly prolong this brief. In fact, the authorities are unanimous in stating that the re-employment provisions of the Selective Training and Service Act should be construed most liberally to the end that the returning veteran should not be placed at a disadvantage because of his service to his country. The considerations of justice, public policy and common decency underlying these tenets are too well founded to require elaboration, and an attempt to do so would be presumptious.

It is agreed (R.65) that if Cross-Petitioner had not been called to the colors he would have been advanced temporarily to the position of carman-mechanic, and would have been placed in that position permanently (R.66) at the time of his reinstatement on December 31, 1945. We urge that this stipulatiton without question entitles Cross-Petitioner to prevail in this case. He would have been classified temporarily as a carman-mechanic 27 days subsequent to his induction and permanently as such at the end of three years. Throughout this case the defense has

been predicated upon the theory—and the Circuit Court of Appeals erred in holding—that Cross-Petitioner was reinstated in the position held by him at the time of his induction, both failing and refusing to recognize the provisions of the stipulation and of the Selective Training and Service Act of 1940, as amended. It would not be possible to state more definitely and clearly that if service to his country had not intervened, Cross-Petitioner would have been permanently classified as a carman-mechanic on November 2, 1945. The stipulation further provides (R.67) that non-veteran employees who acquired the positions of carmen-mechanics during the period with which we are concerned were retained in these positions because their "classifications as carmen" had been made permanent. It cannot be seriously contended that there has been no invasion of the rights of Cross-Petitioner under the provisions of the Selective Training and Service Act. A more flagrant disregard of its purpose could be hardly imagined.

Section 8 of that Act is a positive rather than a negative force in the protection of the employment rights of the returning veteran. It requires the employer to treat the veteran-employee exactly as if he had remained on the job instead of serving in the armed forces. Under it he is entitled not only to the same seniority he had, but his service in the armed forces is counted as service in the plant, so he would not lose ground by reason of his absence. In *Fishgold* v. *Sullivan Drydock & Repair Corporation, supra,* the Court further said:

> "He acquires not only the same seniority he had; his service in the armed services is counted as service in the plant, so that he does not lose ground by reason of his absence."

Justice Magruder, speaking for the Circuit Court of Appeals of the First Circuit, in the case of *Trusteed Funds, Inc.* v. *Dacy* (C.C.A.1), 160 F. (2d) 413, at page 418, said:

> "The terms of which (Selective Training and Service Act of 1940) should be 'liberally construed for the benefit of those who left private life to serve their country in its hour of great need.' "

And in *Feore* v. *North Shore Bus Co.* (C.C.A.2), 161 F. (2d) 552, the Circuit Court of Appeals for the Second Circuit, speaking through Mr. Justice Clark, said:

> "The purpose of Section 8 is to insure that the veteran does not lose ground by reason of his absence."

This principle was again announced in *Gauweiler* v. *Elastic Stop Nut Corp.* (C.C.A.3), 162 F. (2d) 448, in this language:

> "All this means, we think, that what the Act gives to the veteran is the right not to lose his position or seniority by virtue of his absence in military or naval service. He is protected, while away, to the same extent as if he had been either continuously on the job in the plant or away on furlough or leave of absence for some personal reason."

We would like to direct the Court's attention to the opinion of the Circuit Court of Appeals for the Seventh Circuit in the case of *Hewitt* v. *System Federation 152 of Ry. Employees Dept. of Am. Fed. of Labor,* (C.C.A.7), 161 F. (2d) 545. In that case Hewitt was employed by a railway company as a car cleaner at the time of his induction in 1942. He was discharged in 1946, and restored promptly to his old position. The railway had in its employ persons classified as carmen-helpers, their

work requiring a higher grade of technical ability than the car cleaners. By a collective bargaining agreement executed prior to the induction of Hewitt between the Union and the Railway, car cleaners were granted certain seniority rights among themselves, pursuant to which a seniority roster was prepared by the railway listing its car cleaners in order of seniority. Hewitt's name was on that list. The carmen-helpers operate under the same agreement, but there is no provision whereby an employee may transfer from the car cleaners to the carmen-helpers on the basis of seniority rights. In holding that Hewitt was not entitled to be up-graded to carmen-helper upon his re-employment, the Court said:

> "In our case the car cleaners and the carmen helpers, by their collective bargaining agreement, had separate seniority rights among themselves, without a provision whereby an employee classified as a car cleaner might transfer and be classified as a carman helper on the basis of seniority rights. In this state of the record, the trial court, having found as a fact that 'At the time of petitioner's (appellee's) induction into the Armed Forces there was a contract of seniority within the classification of car cleaners as well as a contract of seniority within the classification of carmen helpers, but at no time has there been a contract of seniority governing promotion from the classification of car cleaner to the classification of carman helper,' and 'That petitioner (appellee) at the time of his induction into the armed Forces, had no right to promotion from the classification of car cleaners to the classification of carman helpers by virtue of any custom or any written contract' was in error in directing the railroad to place appellee's name on its seniority list before the names of the eight individual appellants and assigning to appellee the seniority date of April 18, 1943."

Support for our position is also found in the reasoning of the Circuit Court of Appeals for the Sixth Circuit in the opinion delivered in *Raulins* v. *Memphis Union Station Co.* (C.C.A.6), 168 F. (2d) 466. Raulins was employed by the Station Company as an electrician-helper prior to his induction into the Armed Forces. Following service of 3½ years, he was re-employed as an electrician-helper. The Collective Bargaining Agreement with the company provides "that seniority of employees in each craft shall be confined to the seniority sub-division in which employed, and in the event a vacancy shall occur in a higher classification, the oldest employee in point of service, if he shows sufficient ability by fair trial, shall be given preference, but if, after fair trial, he fails to qualify, he may return to his former position. Raulins contended that he was entitled to a position as electrician, which provided increased pay and added benefits, upon his re-employment, inasmuch as others who did not enter the service and who did not possess his seniority with the Company were promoted from electrician-helpers to electricians during his absence. The Circuit Court of Appeals held against his contention, saying:

> "It (the Collective Bargaining Agreement) plainly provides application on the part of the electrician-helper, proof of his qualification for the promotion by actual trial, and for a return to his former position as electrician-helper with full seniority rights if he fails to qualify after a reasonable trial. Although there is a strong probability that the appellants would have applied for promotion to the vacancies and would have been qualified, yet such promotion was not a matter of right or of certainty merely because of seniority."

Now, in the instant case, there is no question as to whether Cross-Petitioner would have been promoted to the classification of carman-mechanic. There was no question as to his qualifications to fill the position of carman-mechanic. There was no question as to whether he would have held the permanent classification of carman-mechanic on the date of his reinstatement, December 31, 1945. This was all covered by the Stipulation (R.64-68). If this Court adopts the well considered reasoning in the *Hewitt* and *Raulins* cases, *supra*, Cross-Petitioner must prevail. He is entitled to any improvement in his status which would have resulted if he had continued on the job instead of entering the Armed Forces. The Selective Training & Service Act gives him the full benefit of whatever added rights he might have acquired if he had remained in his position instead of being inducted into the service. It is the duty of the Respondents to give him the classification of carman-mechanic. *Droste* v. *Nash Kelvinator Corp.* (D.C. Mich.), 64 F.S. 716; *Freeman* v. *Gateway Baking Co.* (D.C.W.D. Ark.), 68 F.S. 383; and *Blackford* v. *Nashville Gas & Heating Co.*, (D.C. Tenn.), 68 F.S. 997.

It cannot be emphasized too strongly that Cross-Petitioner seeks no super seniority; he asks no preference over those who were already classified as carmen-mechanics at the time of his induction, nor over any who attained that classification at any time prior to the date when it would have been awarded to Cross-Petitioner if he had not been inducted. He seeks only the classification and seniority which would have been his if he had been credited by Respondents with the time he spent in the Armed Forces as time on the job. He does not threaten the position of anyone who was senior to Cross-Petitioner at the time of his induction, but only those who were junior

to him and who now seek to displace him solely because of gains which resulted directly from his absence on military duty. We can conceive of no case which more directly invokes the remedies guaranteed by the Selective Training and Service Act.

II

Cross-Petitioner Should Have Received Credit for His Military Service as Time on the Job

Respondents seek to argue that the three-year period between the temporary classification as carmen-mechanic and the permanent classification as provided by the amended Agreement (R.59) meant "actual service" for such time; that this was a training period to qualify the employee for the higher classification. Again, Respondents are met with the Stipulation which recites (R.65) that Cross-Petitioner was qualified for the position of carman-mechanic. In any event, should Cross-Petitioner prove unqualified, he could be discharged. That is a risk he is willing to assume. In other words, the only issue presented is one of seniority and it cannot be disguised. A most casual reading of the contract between the Union and the Railway Company is sufficient to convince that the real purpose of the three-year period and the other limitations on the rights of the up-graded helpers is the protection of seniority rights of those already classified as carmen-mechanics.

Respondents argue that to be "qualified" as a mechanic one must have three years actual work as such. They use "qualified" in this sense as inter-changeable with "qualified" by reason of proficiency and ability. It is stipulated that Delozier had the necessary skill to do the work, but respondents say that he is not "qualified" be-

cause he has not put in three years' actual service. To illustrate this point counsel for respondents in oral argument before the Circuit Court of Appeals stated that Michael Angelo could not have qualified for a position as a car painter on the Missouri Pacific Railway because he had not served the necessary qualifying period. Viewed in this light, it is clear that the three-year period becomes solely a matter of seniority, that is, a mere passage of time having no relation to proficiency. We cannot believe that the words "is still qualified to perform the duties of such position" in Section 8(b) of the Act will be given such a narrow, technical meaning.

That seniority and not proficiency is the true test for qualification for advancement and permanent status as a mechanic is emphasized by Sections 3 and 7 of the employment contract (R.57, 58). Section 3 provides that advancement to mechanic shall be with due regard to order of seniority. (It also provides that qualification for advancement shall be considered, but it is stipulated that Delozier would have been advanced.) Section 7 provides that demotion shall be in reverse order of advancement, i.e., seniority is to be protected. Thus it is clear that Delozier's attainment of permanent status of mechanic was at the time of his induction into the armed forces dependent on the passage of time alone and was therefore a matter of seniority protected by the Selective Training and Service Act.

In *Mentzel* v. *Diamond, et al.*, (C.C.A.3) 167 F. (2d) 299, the Court was called upon to construe the term "service" in a contract for vacation rights. The contract provided for one week's vacation after one year's service with the company and two weeks after five years' service. The question was whether time in military service should

be construed as time in service of the employer in computation of vacation rights under the provisions of Section 8 of the Selective Training and Service Act of 1940. The Court said:

> "The application here is simple. The veteran is to be treated, so far as benefits under the Act are concerned, as though he had worked every day at the plant. He steps back on the escalator, when discharged from the service, at the point where he would have been had he never donned the uniform. That being so, he is entitled to whatever vacation rights would have accrued to him had he not shouldered a gun and gone off to war."

In the case at bar the contract provides that regular helpers advanced to positions as mechanics who have "accumulated three years or more service as a mechanic" may thereafter continue as permanent mechanics with seniority as such (R.59). The Court will note the similarity between the term "service" in this contract and in the contract construed in the *Mentzel* case, *supra*. The term "service" is not further defined in either contract, and we submit that the proper construction was given by the Third Circuit Court of Appeals in holding that "service", so used, included time in military service as time on the job. A distinction is readily apparent between these contracts and those involved in vacation rights cases cited by respondent, wherein vacations were to be accorded only upon the basis of compensated service or periods actually on the pay roll, and the contracts specifically provided that vacation rights should not accrue to those on leave.

The case of *Siaskiewicz* v. *General Electric Co.*, (C.C. A.2), 166 F. (2d) 463, relied upon by Respondents, is not

in point. That suit was predicated upon a claim for vacation pay alleged to be due five veterans who worked for the company at the time of their induction, and were re-employed by the company upon their being discharged from the service. There was no dispute that they were returned to proper job and seniority status. The contract between the company and the Union provided that employees are entitled to annual vacations with pay at the rate of one week for one year of continuous service, and two weeks for five years of continuous service, employees not registered on the payroll not being entitled to a vacation, but if such employees are re-engaged with continuity of service and they work a period of six months (or a period equivalent to their absence if less than six months), they will receive the vacation for which they are eligible. The Court quite correctly held that since the veterans were not on the payroll they were not entitled to vacation pay, saying:

> "Since vacation rights are not pay unless they are for work actually done, and since they are not merely a prerequisite of seniority, they must fall under the heading of 'other benefits.' Hence under the language of the Act, appellants must be treated like non-veteran employees on furlough or leave of absence. But non-veteran employees of appellee who were on leave of absence for more than half a year would not be entitled to vacation pay for that year. Therefore, appellants are not so entitled."

Neither is the case of *Dwyer* v. *Crosby Co.* (C.C.A.2), 167 F. (2d) 567, which Respondents urge, in point. There the contract between the employer and the Union provided for vacation pay to each employee who, prior to July 1, 1946, had been in the employ of employer for at least

26 weeks, but did not indicate that such period might include any part of time during which the employee had been on leave of absence. Dwyer entered the Army in April, 1943, and was restored to his former position in January, 1946. He sought vacation pay. The Circuit Court of Appeals, speaking through Mr. Justice L. Hand, affirmed the District Court in holding that Dwyer was not entitled to the relief prayed, saying that vacation pay, under the contract, should be received only by those who "worked", and further said:

> "If it appeared elsewhere in the contract that the parties had intended all employees 'on leave of absence' to be entitled to include their leave in the computation of their right to vacation, the petitioner would be right in invoking sub-division c. There is nothing of the kind. Apparently he supposes that paragraphs 4 and 5 of Article V have that meaning; if so, he is wrong. The article relates only to rights of seniority, and we should have no warrant for extending it in any way to cover vacations; obviously the considerations which might make it proper that service in the Army should not affect a man's seniority are utterly different from those which should count in computing vacations. Indeed, the statute expressly secured him his seniority, and the provision in paragraph 5 of Article V was unnecessary."

Nor is *Seattle Star* v. *Randolph* (C.C.A.9), 168 F. (2d) 274, authority against the contention of the Cross-Petitioner. Randolph terminated his employment with the Star to enter the service in January, 1942, and upon being discharged in 1946, was re-employed by the newspaper to a position equal or superior to the one he formerly held, without loss of seniority. On August 13, 1947, the Star ceased publication, and Randolph, as well as many others,

became unemployed. At the time of his induction there was in effect between the Seattle Star and the Seattle Newspaper Guild a contract which provided for the payment of severance pay to be computed on the basis of full-time employment of each employee of the paper; provided time spent on leave of absence should not count as service time (Clause 6 of Article VIII of the contract). The Circuit Court of Appeals held that the period spent in the Armed Forces by Randolph should not be included in determining the amount of severance pay due him at the time his employment ceased under the clear and unmistakable terms of Section 308(c) of Title 50, U.S.C. App., saying:

> "Therefore, since paragraph 308(c) provides that time spent in the armed services should be considered as time spent on furlough or leave of absence, such time cannot be counted as continuous service time for the employer because of its exclusion therefrom by clause 6 of Article VIII of the contract in effect at the time they entered the service."

In *Harvey* v. *Braniff International Airways*, (C.C.A. 5), 164 F. (2d) 521, the Court was quick to recognize the difference between an employee who had a fixed right to promotion as Cross-Petitioner does in the instant case, saying at page 522:

> "Where an employee has no fixed or absolute right to promotion and where his right to promotion depends upon qualifications over and above mere length of service, the employer has fully complied with the terms of the Selective Training and Service Act when he restores the veteran to the same position or one of like seniority and pay which he held at the time of his induction into the service."

Respondents also cite the case of *Boston & M.R.R.* v. *David* (C.C.A. 1), 167 F. (2d) 722. In that case there was no longer work available for a veteran with the seniority of David; there were regular mechanics with greater seniority as mechanics available; and David was not qualified for the available work. It was stipulated in the case at bar that Cross-Petitioner was qualified. We see, then, that the facts in the case of *Boston & M.R.R.* v. *David*, are wholly different from the facts in the case before the Court.

The authorities cited above, then, instead of sustaining Respondents, are in aid of the position of Cross-Petitioner. The Selective Training and Service Act itself, in clear, convincing and unmistakable language, provides that a veteran-employee shall be "restored without loss of seniority". The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow or strained construction. *Western & Southern Life Ins. Co.* v. *Huwe*, (C.C.A. 6), 116 F. (2d) 1008. Most assuredly it was the intention of the Selective Training and Service Act that the amended Agreement (R.65) be given full force and effect, and when it is read in the light of that Act, Cross-Petitioner was of right entitled to a classification of carman-mechanic at the time of his reinstatement by the Respondent railway company.

Furthermore, the fallacy of the argument that the amended agreement required three years actual working time to qualify for permanent classification as a carman-mechanic is definitely demonstrated by reference to the table annexed to the Stipulation of Facts (R.67), which gives the dates when other employees were up-graded and the date their classifications became permanent. In every case it was three years to the day after the em-

ployee was up-graded. It is inconceivable that every one of these eemployees worked the full three years without absence due to illness, vacation, willful absenteeism, or some other cause. It will be observed that the 1942 contract (R.59) does not specify that the advanced helper must perform three years actual service in order to qualify for the classification. If it had been intended that Cross-Petitioner must actually work for the company three years, as in the *Dwyer* and *Seattle Star* cases, *supra*, then the contract would have so provided as did the contracts construed in those cases. It cannot be overlooked that solely by reason of Cross-Petitioner's absence in military service junior employees passed him on the employment ladder, which could not have occurred if he had received credit for his military service as was intended by the Selective Training and Service Act. In *Droste* v. *National Kelvinator Corp.*, *supra*, with much soundness of judgment the Court said:

> "It (the Selective Training and Service Act) gives him the full benefit of whatever added rights he might have acquired if he had remained in his position instead of being inducted into the service. If the seniority accumulated during the time he was in the service entitled him a better job classification than he had at the time he entered the service, it is the duty of the employer to give him this better classification."

And, in *Lesher* v. *P. R. Mallory & Co.*, (C.C.A. 7), 166 F. (2d) 983, the equitable principle was reannounced in this language:

> "To put it more directly, he is entitled to be restored to the same status which he would have occupied had his employment been uninterrupted by military service."

The same principle was recognized in *Curtis* v. *R.R. Perishable Inspection Agency* (D.C. Mass.), 71 F.S. 153, where it was ordered that the veteran's rights be enforced at the expense of all employees whose employment commenced after his, regardless of Union affiliation.

Cross-Petitioner has been required to step back on the "seniority escalator" at the point where he stepped off, instead of the point he would have occupied had he kept his position continuously during the war. The Stipulation (R.65) states that he would have been classified temporarily as a carman-mechanic 27 days subsequent to his induction, and this classification would have been permanent at the end of three years because he was qualified to fill such position permanently. As the matter now stands, service to his country has caused him to be cast back into the lower classification of carman-helper. He has been penalized because he served his country in time of need. Fifteen employees who occupied lower positions on the escalator than Cross-Petitioner at the time of his induction have risen to a place of greater security and pay, and when the escalator was reversed in the demotion process, Cross-Petitioner was the first to be removed. That is exactly what happened to Cross-Petitioner. Can anyone say that he has not lost ground by reason of his absence?

We will not burden the Court with argument as to whether the position to which Delozier would have been entitled, had he not served in the armed forces, was a "temporary one". The Circuit Court of Appeals, in *Spearman, et al* v. *Thompson*, (C.C.A.8), 167 F. (2d) 626, fully and correctly stated the law in this respect, and we think there is no need to amplify it. It is also well cov-

ered by the brief of the Government which is filed in this Court on behalf of *Spearman, et al.*

We now submit that the Circuit Court of Appeals erred when it failed to hold that Cross-Petitioner was entitled to have his time in military service considered as time in service for the railroad company, and to have a permanent classification as a mechanic with seniority as a carman-mechanic from November 2, 1945, together with the incidental pay lost by his wrongful demotion.

CONCLUSION

The situation here presented, where civilians replaced soldiers in their employment, and not only enjoyed the advantages of temporary comfort, security and profit during the war, but also laid claim to permanent advantages at the expense of those who were protecting them, was the nightmare of the service man, against which he was promised the full protection of the law. There is no justification in law or good conscience for a decision against Cross-Petitioner. It is agreed that he would have had a permanent classification of carman-mechanic 59 days prior to his reinstatement if he had not entered the service. We are convinced that any reasonable and logical interpretation of the Selective Training and Service Act will give him the relief to which he is so justly entitled. To do otherwise would place even a greater sacrifice upon service and penalty upon patriotism.

Respectfully submitted

LEON B. CATLETT
727 Pyramid Building
Little Rock, Arkansas

Attorney for Cross-Petitioner,
William H. Delozier